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### MR. JUSTICE HOLMES ON "EFFERVESCENT OPINIONS"

The letters and other comments in the press on the recent "Bund" meeting in New York call to mind one of the wisest things that the late Mr. Justice Holmes ever said. In some address or other, during the prohibition era, he reminded us that,

> "effervescent opinions, like the not yet forgotten champagnes, go flat quickest when exposed to the air."

The mayor and the police force of New York deserve the thanks of the entire country for protecting the "effervescent" members of the "Bund" in their opportunity to demonstrate, in so striking a manner, the truth of Mr. Justice Holmes' remark.

### A PHRASE TO BE REMEMBERED

By way of contrast, in these days of effervescence in many directions, we call attention to a phrase which we have never before heard, or seen in print, although the idea, of course, is as old as language. In a recent communication in the *Boston Herald* of March 19th, 1939, Mr. D. E. Moeser refers to "*the tremendous force of moderation.*" That was the "force" of Washington and of Lincoln and it is the *gradual* force which is essential in government. It was ignored by Thaddeus Stevens, and his headstrong followers in the north, in their reconstruction policy after the Civil War, and it has been ignored since then; but it has been expressly recognized ever since 1780, as a *principle* of government in the 18th article of the Massachusetts Bill of Rights as follows:

> "XVIII. A frequent recurrence to the fundamental principles of the constitution, and a constant adherence to those of piety, justice, *moderation*, temperance, industry, and frugality, are absolutely necessary to preserve the advantages of liberty, and to maintain a free government." . . .

That article deserves to be read and re-read in these days because it was put there for the one obvious purpose of reminding men to think about things likely to be forgotten.

F. W. G.

### JOINDER OF CAUSES OF ACTION WITHOUT ELECTION ST. 1939, C. 67

SECTION 1. Section seven of chapter two hundred and thirty-one of the General Laws, as appearing in the Tercentenary Edition, is hereby amended by striking out clause sixth and inserting in place thereof the following:—

> Sixth, Causes of action in contract and in tort shall not be joined, except when they arise out of the same matter, and in such case they shall be stated in

separate counts and be heard and determined together, and the plaintiff shall not be required to elect between them.

SECTION 2. This act shall take effect upon *August first* in the current year.

## IMPUTED NEGLIGENCE IN GUEST CASES—THE BESSEY OPINION OF 1939 AND THE SHULTZ OPINION OF 1907

The recent opinion of Mr. Justice Cox in *Bessey, Administrator v. Salemme* on January 31st, 1939 (Advance Sheets p. 115) is of practical importance both to the bench and to the bar because of the study and explanation which it contains of the opinio in *Shultz v. Old Colony Street Ry.*, 193 Mass. 309. As stated by the court (p. 133):

"For over thirty years, the doctrine of the Shultz case as to voluntary surrender has been a disturbing factor in the jurisprudence of this Commonwealth. Judges have been troubled in their efforts to instruct jurors or themselves in accordance with the principles there enunciated."

We think the readers of the *Quarterly*, and particularly those who do not have the Advance Sheets of the reports, will find it convenient in practice to have the recent conclusions of the court printed here for reference.

After an extended study of the cases, the court quotes the following passage from the opinion in the Shultz case, using italics to focus attention on the language which has caused uncertainty in the minds of the bench and bar as follows:

"Disregarding the passenger's own due care, the test whether the negligence of the driver is to be imputed to the one riding depends upon the latter's control or right of control of the actions of the driver, so as to constitute in fact the relation of principal and agent or master and servant, *or his voluntary, unconstrained, non-contractual surrender of all care for himself to the caution of the driver*. (Italics ours.) Applying this statement of the law to the present case, the result is that the plaintiff would not be entitled to recover if in the exercise of common prudence she ought to have given some warning to the driver of carelessness on his part, which she observed or might have observed in exercising due care for her own safety, *nor if she negligently abandoned the exercise of her own faculties and trusted entirely to the vigilance and care of the driver. She cannot hide behind the fact that another is driving the vehicle in which she is riding, and thus relieve herself of her own negligence.* (Italics ours.) . . .

Mr. Justice Cox then continues:

"It is our opinion that those parts of these quoted paragraphs where it is said 'or his voluntary, unconstrained, non-contractual surrender of all care for himself to the caution of the driver,' and 'nor if she negligently abandoned the exercise of her own faculties and trusted entirely to the vigilance and care of the driver,' were not necessary to the decision of the case, unless it was the

purpose to point out that a negligent guest could not recover merely by proving due care on the part of his driver . . .

"In the *Shultz* case, the doctrine of imputed negligence arising from a voluntary surrender was referred to as if something apart from the 'passenger's' own due care, . . . But this was closely followed by the statement that an abandonment of care must be a negligent one. We think it has been assumed generally in the cases that have followed the *Shultz* case that, if a complete surrender on the part of a plaintiff of all care of his person is to be of consequence, it must be a negligent surrender . . .

"And it has been held, as we think rightly, to be but one aspect of contributory negligence . . .

"All that seems to be left of the doctrine of voluntary surrender is that, if a plaintiff is contributorily negligent, he cannot recover. . . . When the *Shultz* case was decided, some of the cases that had preceded it had inquired of the conduct of both guest and driver; the *Evensen* case had looked only to the conduct of the driver. Some cases, harking back to the *Allyn* case, contained a germ of imputability without giving it that name. We think that one result that the *Shultz* case should have accomplished was to destroy that germ. If it failed in its purpose it is not too late to complete the task.

"Upon careful consideration, we are of the opinion that the administration of justice will be better served if the so called doctrine of voluntary, non-contractual surrender of all care is eliminated from our law, so that, in cases where a guest in a private conveyance, being of sufficient age and capacity to exercise care for his own safety, and being in none of the relationships to the driver that cause the latter's negligence to be imputed to him (such as master or participant in a joint enterprise), is injured because of the concurrent negligence of the driver and a third person, the inquiry in an action against the third person, whether the guest may recover in such circumstances, will be gone into no further than to decide whether he was guilty of contributory negligence, and that the so called doctrine of voluntary, unconstrained, and non-contractual surrender will no longer be applicable to such situations."

The foregoing extracts seem to contain the practical results of the opinion.

F. W. G.

## THE CONSTITUTIONAL AUTHORITY OF THE LEGISLATURE IN CONNECTION WITH FULL TIME JUDICIAL SERVICE IN DISTRICT COURTS

This article is merely a discussion of *law* and not of policy. In its 14th Report, the Judicial Council says:

"From a long range point of view, the conception of full-time judicial service must come into collision with our present segregated court system. The obvious thing to do is to bring these courts more together. Legal questions apart, this could be done by unification, or, to a lesser degree, by co-ordination. In the absence of . . . . . constitutional power in the legislature, not only to create, but to merge courts, true unification would appear impossible.

"On the other hand, much can be done, as the cases cited in the footnote, show,

in the field of coordination. The only obstacle there is, that, of all the officials of a given court, the judge alone cannot be legislatively made the judge of another court than that to which he was appointed. But the power of his court, and consequently his power, may be enlarged, or reduced, as the legislature may think wise. Control from without may be imposed if found necessary for more uniform, or economical, operation. Means can be devised to divide the total load more evenly among the courts of a given area, as by transfer of cases for trial, so as to give more full-time judicial service. Varying practices, on the the part of other officials than judges, in what are now isolated courts, can be much reduced through association, and more cooperation obtained. Such benefits may be expected, not so much from legislation as from administration, if that power is given in a less diffused form. Until legislative opinion becomes more settled as to the extent to which full-time judicial service is practicable, it appears improfitable to do more than state these fundamental considerations."

Our present district court system, with its 72 judicial districts, each independent, contains an inevitable limit to the full-time justice plan. The union of a court where the judge has more than a full time load with a neighboring court where there is less than a full time load, *without abolishing either court*, might readily supply the public with two full-time judges both in name and fact. Like results might be expected if such a method were applied to the county, to the appellate districts or to any other political subdivision.

We think it probable that an act in the nature of a suggested model act, which could be adapted to different areas in the commonwealth when, as and if, wanted, and which would meet all the constitutional requirements, can be drawn if the language of the opinions as to the scope of the legislative authority in regard to the courts is closely studied and followed. A possible outline of such a draft act is suggested at the end of this note.

The pertinent constitutional provisions are:

Chapter I, Art. 3, authorizing the legislature to erect and constitute judicatories and make all reasonable laws, etc., subject, of course, to the 29th and 30th articles of the Bill of Rights, in which the Supreme Judicial Court is recognized as the head of an independent co-ordinate department of the government and it is provided that the legislature shall not exercise judicial powers.

Chapter III, Art. 1, provides that all judicial officers shall hold their offices during good behavior and this tenure of office shall be expressed in their commission.

Chapter VI, Art. 5, provides, "All writs, issuing out of the clerk's office in any courts of law, shall be in the name of the Commonwealth of Massachusetts; they shall be under the seal of the court from whence they issue; they shall bear test of the first justice of the court to which they shall be returnable, who is not a party, and be signed by the clerk of such court."

The most important and illuminating opinions for study in this connection are those of Chief Justice Rugg in 1923, in *Com.* v. *Leach*, 246 Mass. 464; in 1932 in *Buchanan* v. *Meisner*, 279 Mass. 457, and the opinion of Mr. Justice Charles A. Dewey in 1843, in *Brien* v. *Commonwealth*. Of these cases the Leach case deserves special attention. The Leach case involved the question of the constitutionality of St. 1923, c. 469, which provided for the now common practice under which a district court judge may, on request of the chief justice of the Superior Court, sit with juries in the Superior Court for the trial of criminal appeals of our district courts, and while so sitting may "have and exercise all the powers which a justice of the Superior Court has and may exercise in the trial and disposition of such cases."

The act was an experiment to break the serious congestion of of criminal cases in the Superior Court about 20 years ago, and followed a suggestion of the Judicature Commission in its Second Report in 1920 at the bottom of page 102. The plan was an adaptation of a suggestion made to that Commission by the late Justice Callahan of the Superior Court and was recommended for serious consideration by the Judicature Commission on the ground that "the great advantage of this scheme is that it would utilize existing machinery without the creation of any new courts or officers, would avoid the congestion of criminal business by providing the means for a speedy trial of all cases and lessen the evils of congestion," which were vividly described on pp. 92–93 in a letter to the Commission by a former assistant district attorney (now a justice of the Superior Court).

The legislature having followed the suggestion of the Commission in an experiment to reduce the evils to a minimum, the constitutionality of the act was challenged in the Leach case as an illegal attempt by the legislature to appoint judges of the Superior Court. The court sustained the statute on the ground that while district court judges could not become Superior Court judges by statute, they could be authorized to exercise district Court jurisdiction in the Superior Court, as had been suggested by the Judicature Commission.

In support of the decision Chief Justice Rugg said:

"The General Court further is given full power and authority by C. 1, § 1, art. 4 of the Constitution to make 'all manner of wholesome and reasonable orders, laws, statutes, and ordinances, directions and instructions . . . and to name and settle annually, or provide by fixed laws for the naming and settling, all civil officers within said Commonwealth, and the election and constitution of whom are not hereafter in this form of government

otherwise provided for; and to set forth the several duties, powers, and limits, of the several civil and military officers of this Commonwealth. . . .'

"As a part of this comprehensive grant of power the legislative department of government may according to its conceptions of the needs of the public welfare fix and limit and change and transfer from one to another the civil or criminal jurisdiction of all such courts. It may abolish existing courts with the exception of the Supreme Judicial Court and erect others in their stead and distribute among them jurisdiction of all justiciable matters in its own wisdom. The history of the courts of the Commonwealth is replete with illustrations of the exercise of this power by the legislature: *Brien* v. *Commonwealth*, 5 Met. 508; *Dearborn* v. *Ames*, 8 Gray, 1; *Wales* v. *Belcher*, 3 Pick. 508; *Commonwealth* v. *Phillips*, 11 Pick. 28; *Commonwealth* v. *Phelps*, 210 Mass. 78. Power of Legislature to Create and Abolish Courts, by Horace Gray (later Chief Justice of this Commonwealth and a Justice of the United States Supreme Court) 21 Law Reporter 65, 73 to 83 (reprinted in Appendix B of 2nd Report of Judicature Commission).

"The amplitude of these grants to the legislature of power over courts is bounded by the other provisions of the *Constitution*. Manifestly it would be beyond the scope of legislative authority to attempt to create courts whose judges should not be appointed by the governor by and with the advice and consent of the council, c. 2, art. 9; or whose tenure of office should be other than during good behavior, . . .

"There are numerous statutes now in force whereby the General Court has changed and enlarged the powers and jurisdiction of judges. Sometimes this has been accompanied by enlargement of the jurisdiction of the courts and sometimes without otherwise affecting or modifying the jurisdiction of the courts.

"It is provided by G. L. c. 218, § 40 that judges and special justices of the several district courts, except of the Municipal Court of the City of Boston, may perform each others' duties when necessary or convenient. Similar provision exists with reference to judges of probate of the several counties. G. L. c. 217, §8. The probate courts in the several counties are separate tribunals, to each of which judges have been appointed by the executive department of the government. G. L. c. 215, §1; c. 217, §§1, 2. The same is true of the several district courts. All have in general limited territorial jurisdiction. When action is taken under these provisions of the statutes as to interchange of duties, the request or designation is to be made by a judge or some officer other than the governor. Such request or designation is not a

commission or appointment. The effect of these provisions is to enlarge by the legislature the territorial jurisdiction of the several judges and to provide for its exercise in some appropriate way. This constitutes no invasion of the constitutional powers of the executive department of the government. It is a redistribution of some of the existing judicial powers . . .

"The statute here assailed establishes no new courts. It creates no new judges. It provides for no new officers. Its utmost sweep is to utilize existing courts and to employ judges already appointed and commissioned for different service from that hitherto required. It is an adaptation of the present judicial organization to changed conditions. It is apparent from the title and frame of the statute that it was designed to relieve a congestion of criminal cases accumulated and accumulating in the Superior Court.

"The district courts of this Commonwealth are courts of record and of superior and general jurisdiction with reference to all matters within their jurisdiction. G. L. c. 218, §4. In this particular, judges of district courts stand on the same footing as judges of the Superior Court.

"The judges of the district courts when sitting in the Superior Court are not created judges of the Superior Court for the time being. They cannot be or become other than judges of district courts according to their respective commissions. The offenses which may be tried and the sentences which may be imposed by district court judges sitting in the Superior Court under the statute are those within the original and concurrent jurisdiction of district courts under G. L. c. 218, §§26, 27. The jurisdiction over offenses is not enlarged. . . .

"The jurisdiction of every district court judge is enlarged by the statute. He is made liable to service if and when request is made as provided in the statute. The potential jurisdiction to try the designated classes of cases was conferred upon all the district court judges when the statute became operative. That was a legislative act. So far as it was a mere enlargement of jurisdiction of those holding commissions as judges of district courts, it was within the scope of the power of the General Court under the provisions of the Constitution and the decisions, to which reference has already been made. . . .

"The effect of the statute is that district court judges are empowered, when so called on, to use the machinery of the Superior Court with which to try and dispose of cases within the general jurisdiction of district courts. The trials, sentences and dispositions are in their substance and effect upon the public and upon the defendants the same as if held in the Superior Court. But

the judges continue to act as district court judges with the added force given to their judicial conduct by the statute. All this might indubitably have been accomplished by the legislature by requiring all the added functions to be performed in their several courts. There is no constitutional objection to enabling them to utilize the appurtenances of the Superior Court to the same end.

"The conclusion is that the statute as thus interpreted violates no one of the provisions of the Constitution. It does not invade the province of the executive department of government. It confers no executive functions upon the judicial department of government....

"The Superior Court and all the district courts have been established from time to time by the legislative department of government pursuant to the power conferred by the Constitution. The jurisdiction of these courts may be 'modified, enlarged, diminished or transferred, in the same manner as the jurisdiction of all other courts subordinate to the supreme judicial court.'

—*Russell* v. *Howe*, 12 Gray, 147, 153."

Applying this opinion to a hypothetical plan merely for the purpose of raising inevitable questions of law for consideration—if the jurisdiction of the judges of all the courts in any given area, such as a county or some large city, or group of judicial districts, should be extended to cover the whole area, the standing justices put on a full-time basis subject to assignment for service in any part of the area, the clerks' offices left as they are subject to supervision or their duties readjusted to fit administrative needs and their authority to issue writs extended throughout the area, no court would be abolished, no judge's tenure or clerk's tenure would be affected, but the courts would simply be related in an administrative system under centralized supervision on a full-time basis so that the existing judicial force in that area could be used where the public business needed it.

This hypothetical plan illustrates the fact that under the constitutional provisions the legislature can not make a judge of one court into a judge of another court, but can extend his jurisdiction to cover a larger area and authorize him to sit as a judge in some other court house within that area, just as a district court judge may today be called to sit not only in other districts but in the Superior Court, not as a Superior Court judge, but as a District Court judge exercising some of the larger jurisdiction which has been extended to him when he is thus called upon. In the same way, administrative authority for assignment of judges in that area could be provided by direction of the Chief Justice of the Supreme Judicial Court, or otherwise, just as the members of the

Administrative Committees of the District Courts and of the Probate Courts and the Appellate Divisions of the District Courts have been selected ever since 1922 by the Chief Justice of the Supreme Judicial Court.

Any plans which may be suggested for the closer relations of courts would have to be subjected to the tests thus described before any act which might be drafted along these lines was adopted by the legislature. F. W. G.

## THE BILL TO BROADEN THE SCOPE OF AN ATTORNEY'S LIEN AND AND THE REASONS FOR ITS DEFEAT

The following bill, *House* 1774, was reported favorably by the Judiciary Committee, passed the House, and was defeated in the Senate. The bill proposed to amend G. L., Chap. 221, § 50 by inserting the words "counsel fees for services" so as to read as follows:

Section fifty of chapter two hundred and twenty-one of the General Laws, as appearing in the Tercentenary Edition, is hereby amended by inserting after the word "fees" in the third line the following:—counsel fees for services,—so as to read as follows:

*Section 50.* An attorney who is lawfully possessed of an execution, or who has prosecuted a suit to final judgment in favor of his client, shall have a lien thereon for the amount of his fees, counsel fees for services, and disbursements in the cause, but this section shall not prevent the payment of the execution or judgment to the judgment creditor by a person who has no notice of the lien.

The debate in the Senate was briefly reported as follows in the "*Springfield Republican*" of March 24th, 1939:

"Boston, March 23—The Senate this afternoon defeated a bill to give lawyers first lien on judgments awarded to clients. Senator Wilfred Bazinet of Webster opened fire on the measure, contending the bill would put the commonwealth in the position of saying lawyers must have their fees. He would have them go to court and not appeal to the legislature to protect them.

"Senator Donald W. Nicholson of Wareham agreed with him, saying, 'I think we need more dentists and less lawyers.' Senator John D. Mackay, a lawyer, defended the bill, saying the same principle runs through all other occupations. After a further defense of the measure, Nicholson noted there wasn't a bill affecting lawyers before the legislature, that they were not 90 per cent in favor of it. He said they usually get the lion's share of a judgment and ought not to be given any more rights than any other profession.

"The Senate was warned there was nothing to prevent lawyers from increasing fees, if they were guaranteed first crack at the judgment.

"Bazinet said he would cite a hundred cases where patients have 'walked off with my false teeth and I have never received any payment,' in contending other professions are just as much entitled to such protection. The bill was denied a second reading by a rising vote of 9 to 15."

The proposal contained in the bill is not a new one. In order that the reasons advanced by those members of the bar who believe the lien should be extended, should be fully presented, we printed in the *Massachusetts Law Quarterly* for January, 1936 (pp. 82-97) an article by Joseph Meline, Esq., which is, we believe, the most complete discussion of the subject that has appeared in recent years. The same sort of problem arises in other professions as well as in business generally. Doctors, hospitals, material men have all asked the legislature for liens or extended liens within recent years.*

F. W. G.

## EXTRACTS FROM THE NEW YORK STATE BAR ASSOCIATION

## LAWYER SERVICE LETTER

[*Any communications concerning the Lawyer Service Letters should be addressed to Henry S. Fraser, Editor, Syracuse, N. Y.*]

LETTER NO. 32 MARCH 8, 1939

### FEDERAL LEGISLATION

### Price-Fixing

A decision of momentous significance was recently handed down by a three-judge court sitting in the District of Columbia, upholding the constitutionality of the price-fixing features of the Bituminous Coal Act of 1937. The significance of the decision reaches far beyond the statute in question and indeed gives rise to a constitutional problem of immediate and national importance. In brief, the court held that under the commerce clause the Congress may fix the selling price of any commodity moving across state lines. It follows that if this decision is upheld on appeal to the Supreme Court of the United States, the entire economic life of the nation will be subject to fundamental change.

In view of the vast importance of this holding, it is desirable that all members of the New York State Bar Association analyze the reasoning in the court's opinion and contemplate the legal and economic issues at stake. To this end your editor has digested the opinion and has also set forth below some contrary arguments as gleaned from the winning brief in the Carter Coal Company case decided in 1936 by the Supreme Court of the United States (298 U. S. 238).

#### *Digest of the Case*

The aforesaid case involving the Bituminous Coal Act of 1937 is entitled *City of Atlanta v. National Bituminous Coal Commission,*

*See Mass. Law Quarterly for May 1934, 43-44; 7th Report of Judicial Council, M. L. Q., Nov. 1931, 36; 13th Rep. Judicial Council, M. L. Q.: Preliminary Supplement for Jan., 1938

and was decided by a statutory District Court (per Miller, J.) in the District of Columbia on February 15, 1939. The plaintiff contended that the commerce clause does not confer upon the federal government the power to fix prices of coal sold in interstate commerce. The court asserted that Congress has power to control interstate commerce so as to affect prices indirectly, inasmuch as the fixing of rates for transportation, and the regulation of conditions of labor, necessarily affect prices in many cases. Furthermore, since in *Nebbia v. New York*, 291 U. S. 502, it was held that the states have power to fix prices in the regulation of their internal commerce under the police power, there is no reason to deny to Congress a commensurate and direct power with respect to the regulation of interstate commerce. In the next place, the court relied upon three other cases in which it "seems to be implicit in the language" that Congress has the power in question. Such cases were *Public Utility Commission of R. I. v. Attleboro Steam & Electric Co.*, 273 U. S. 83, 90; *Lemke v. Farmers Grain Co.*, 258 U. S. 50, 61; and *Shafer v. Farmers Grain Co.*, 268 U. S. 189, 202. Finally, the court held that the means chosen by Congress, as embodied in the Act, are appropriate to the permissible end, *i. e.*, the regulation of commerce. "Conditions in the marketing of coal have long been more or less chaotic, with the result that the flow of commerce in coal has been seriously burdened and impaired. It was to eradicate this evil, and to prevent its recurrence, that Congress acted thus to protect interstate commerce."

*Contrary Arguments*

"Perhaps the most complete analysis ever made of the alleged price-fixing power of Congress is contained in the Supreme Court brief of the Carter Coal Company. The public as a whole is unaware of the existence of this study for the reason that the question of the constitutionality of federal price-fixing was not passed upon in the majority opinion in the Carter case. The arguments set forth in such brief are directly in point and will inevitably be considered if and when the Bituminous Coal Act case is appealed."

The Editor then states the substance of arguments from the briefs, and refers to the cases cited by the District of Columbia Court as follows:

"As to the *Nebbia* case, relied upon by the District of Columbia court, the brief writer urges that the statute there involved made no pretense of regulating commerce, intrastate or otherwise, but was frankly labeled what it was, *i. e.*, a statute to regulate the milk industry in New York by price-fixing, as a temporary expedient. The only question there decided, according to the brief, was whether the state enactment—an exercise of the state's reserved power to provide for the general welfare—was violative of the guaranties of liberty and equal protection contained in the Fourteenth Amendment,—quite a different question from the scope of a granted power of the United States.

"In respect of the case of *Public Utility Commission of R. I. v. Attleboro Steam & Elec. Co., supra,* the brief asserts that the question of federal price-fixing was not there presented, but if it should be determined, when the question of federal regulation of rates of sale and transmission of electric energy is presented, that such rates may be so fixed, such determination, involving the rendering of an exclusive transportation service ordinarily of a geographically monopolistic nature, would leave untouched the contention that the interstate commerce clause carries with it the power to fix the selling price of any and all commodities crossing state lines.

"As to the *Lemke* and *Shafer* cases, *supra,* relied upon by the District of Columbia court, the Carter brief points out that the dicta therein pointing to the existence of federal power of price regulation related only to the prevention of fraud in interstate commerce, a familiar power exercised under the Anti-Trust Acts for many years. Says the brief: "The Court did *not* say that the Congress could prohibit the movement of ordinary wholesome commodities in interstate commerce, or that it could regulate the price at which they should be permitted to move. The only statement is that Congress is empowered to keep interstate commerce in the purchase and sale of commodities free from fraud."

### The Three Labor Decisions

"Certain important consequences would seem to follow from the three decisions of the Supreme Court of the United States handed down on February 27th affecting administration under the National Labor Relations Act.

"As a result of the *Fansteel Metallurgical Corporation* case the sit-down strike as a labor weapon passes into history. In the second place, the Labor Board will undoubtedly order more elections to determine collective bargaining agents. In the past the Board has frequently certified a union on the basis of a situation existing a long time prior to the date of certification. The Fansteel decision frowns upon this practice where circumstances in the interval cast doubt upon the strength of the union at the date of the hearing. Thirdly, discharges of employees will probably be more frequently upheld. In the past, discrimination on grounds of union activity has been laid at the employer's door despite evidence as to improper conduct of the discharged employee, that is to say, inferences have on occasion been favored over direct evidence. The Court's decision permitting discharge when not designed to interfere with union activity will undoubtedly result in the issuance of fewer complaints charging discrimination. Indeed, Mr. Justice Reed in his dissenting opinion characterized the effect of the majority holding as permitting the employer to 'discharge any striker, with or without cause, so long as the discharge is not used to interfere with self-organization or collective bargaining.' Finally, the Fansteel decision will unquestionably result in more peaceful strikes. Since an employer may discharge a picket who molests any workman attempting to approach the plant, and may discharge any striker for acts of violence during the strike, it necessarily follows that strikes will more and more return to their original basis, namely, a peaceful exertion of economic pressure upon the employer.

"In the *Sands Manufacturing Company* case, the testimony of a shipping clerk, and even of the superintendent on one occasion, was held not to amount to a scintilla when considered in the light of the company's long course of conduct in dealing freely with the union. In other words, casual statements by foremen

and other supervisory employees are not to be taken as binding upon the company where the real policy of the company is apparent from uncontradicted evidence.

"As to the *Columbian Enameling and Stamping Company* case, perhaps the most important feature of the opinion relates to the extent of judicial review of the Board's findings. Mr. Justice Stone reiterated what had been determined in this behalf in the *Consolidated Edison Company* case (*vide supra*, pp. 109-110), and then went on to add that the evidence sufficient to sustain a finding of fact by the Labor Board 'must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury.' This goes far to lay the ghost of administrative finality. In fact, the entire subject of judicial review will merit restudying in the light of the *Consolidated Edison* and the *Columbian Enameling Company* cases."

## REPORT OF BOSTON LEGAL AID SOCIETY FOR 1938

*In the "Preliminary Supplement" of the "Quarterly" in January of this year we printed the report of the Voluntary Defenders Committee. We now print an account of the progress of the charitable work of the profession on its civil side.*—Editor.

### REPORT OF THE GENERAL COUNSEL

Last year the Legal Aid Society had 11,239 cases, an increase of 5.7 per cent over 1937. Only one client in three was employed and the average weekly salary was $20.00. They were of all races, religions and nationalities—30 per cent were born outside the United States. Of the foreign born, the largest number came from Canada, followed closely by groups from Ireland, Italy and Germany. We also had 24 Syrians, 16 Turks, 32 Portuguese and one each from Persia, India and Brazil.

These clients came from a number of sources such as courts, probation officers, social agencies and police. Many of our former clients get into fresh trouble and have come back for help. Others are sent by former clients. Frequently clients themselves do not know how they happen to come to us. They say some friend told them about the Society or that they have always known about it and came as soon as they were in trouble.

Year after year the legal problems presented by our clients are very much the same. The reason for an increase or decrease in a certain type of case is not always explainable. For example, our insanity cases doubled last year and we do not know why. Installment contract cases have increased steadily over the past five years—probably due to the fact that more people buy on the installment plan at the present time than ever before. Our personal injury cases have been falling off rapidly. Last year they were only 35 per cent of the number we had in 1934.

Husband and wife cases have grown in number until at the present time one out of every three cases in the office is a domestic relation case of one form or another. Last year we had 3,573 such cases or an increase of 41 per cent over the number we had five years ago. Legal Aid Societies in New York, Philadelphia and Chicago are also having more domestic relation cases each year. Judges and court officials, as well as social agencies, send us more of these cases than they used to because we are probably better known. The greatest reason for the increase is due to the fact that public welfare agencies of the city, state and federal governments require that a deserted wife establish such desertion by a decree of separation or a divorce as a prerequisite to obtaining aid. Each of the four lawyers in the Domestic Relation Department handled an average of 850 cases last year and they did a very good job indeed.

No statistics could give an adequate picture of how our cases are disposed of. That most of them should be advice cases is obvious, if it were otherwise we should not have been able to take care of so many. 7,365 of our clients were given advice or sent to some agency that could help them more effectively than we. 1,083 were referred to private counsel, though it is doubtful that more than one third of them actually consulted the lawyer to whom they were sent.

Cases settled without any court action are about the same as 1937 in number—we settled 1,053 such cases. Cases requiring court action were more numerous than ever before. There were 831 of these, of which we were successful in 802 and lost 29. Winning such a large percentage of cases is not as impressive as it sounds since many of them were uncontested matters in the probate courts, and while the result was satisfactory to the client, the vast majority of these cases were not thrilling court battles.

Most Legal Aid Societies confine their court appearances to those cities in which the Societies are situated. We have never restricted our practice to the City of Boston and it is doubtful if we have ever had any definite geographical limits. Last year the Society's attorneys appeared in eighteen different municipal and district courts in or near Boston, and in the probate courts of eight different counties; the superior courts of Suffolk, Norfolk, Middlesex and Essex; the United States District Court in Boston and the Supreme Judicial Court in Boston. . . .

The most important item in our income is naturally the amount we receive from the Community Federation, which has always been extremely fair in allotting funds to us. . . . Law firms contributed $3,070, a slight falling off from the preceding years. Certain law firms that contributed to us in the past now prefer to give their entire contribution to the Federation and it is difficult for us to get new givers. . . .

We collected $85,477 for our clients during the year, or an average of $7.19 per case. This figure does not include money orders for future alimony and workmen's compensation which we cannot be certain will ever be paid. . . .

RAYNOR M. GARDINER,
GENERAL COUNSEL.

(*See Statistical Table of Business Below*)

1938

CASE STATISTICS

| KINDS OF CASES | | DISPOSITIONS | |
|---|---|---|---|
| Various Money Claims | 1,643 | Advice | 5,680 |
| Installment Contracts | 657 | Advice and Referred to Proper Agency | 1,465 |
| Unclassified Contracts | 577 | Advice and Referred to Private Attorney | 1,083 |
| Workmen's Compensation Insurance | 252 | Referred to Small Claims Court | 382 |
| Personal and Other Injuries | 603 | Discontinued | 868 |
| Attorney and Client | 124 | Legal Papers Drawn | 335 |
| Estates of Deceased Persons | 523 | Settled | 1,053 |
| Real Estate and Tenancy | 1,309 | Won after Litigation | 801 |
| Illegitimacy | 109 | Lost after Litigation | 29 |
| Domestic Relations and Non-support | 3,573 | Refused under Rules of Society | 134 |
| Guardianship, Adoption and Custody | 541 | Clients Unable to Advance Court Costs | 51 |
| Miscellaneous | 1,328 | | |
| | 11,239 | | 11,881 |

CLIENT STATISTICS

| | | | |
|---|---|---|---|
| Employed Clients | 4,826 | Average Weekly Wages of Employed Persons | $20 |
| Unemployed Clients | 6,383 | Average Number of Dependents | 2 |
| Citizens by Birth | 7,804 | Average Monthly Rent Paid | $22 |
| Citizens by Naturalization | 2,266 | | |
| Aliens | 1,169 | | |

Money Collected for Clients, $85,477.84. Clients represented 40 Nationalities.

## SUPPLEMENTARY NOTES TO THE RECENT EDITION OF CROCKER'S "NOTES ON COMMON FORMS".

For the convenience of the bar, the following notes are printed by permission of the Massachusetts Conveyancers' Association and of Mr. Swaim. The new edition of Crocker was called to the attention of the bar in the October–December number of the QUARTERLY. The book and the following notes are likely to be found useful in practice by the bar in general whether or not they specialize in conveyancing. These notes can be readily copied into the book as indicated for future reference.

F. W. G.

### MASSACHUSETTS CONVEYANCERS' ASSOCIATION.

At the annual meeting in 1936 it was voted to direct the Executive Committee to consider and report at the next meeting a plan for the use of the Samuel T. Harris Memorial Fund. At the annual meeting in 1937, the Committee, by its Chairman, Moses S. Lourie, Esq., reported that it was of the opinion that the Fund should be devoted in whole or in part to the financing of some publication or publications to be sent from time to time to the members, and mentioned some projects which had been considered. Thereafter it was voted to authorize the Committee to make such use of the Fund as it might deem best.

The recent publication of the Sixth Edition of Crocker's Notes on Common Forms, edited by Roger D. Swaim, Esq., appeared to the President and to other members of the Committee to furnish an excellent and profitable opportunity for putting into operation the project referred to in the vote above mentioned, and Mr. Swaim has kindly consented to give trial to this project by preparing the following notes on recent and earlier cases and matters of general interest to the profession with directions as to references thereto which may be advantageously made in his edition of Crocker's Notes. While Mr. Swaim has not obligated himself to continue this service for any stated period, it is probable that it may be continued indefinitely, with publication made at least twice in each year, provided the interest displayed by the members warrants the involved expense which will not be large.

The Committee is of the opinion that this form of publication is a fitting reminder of Mr. Harris. Scholarly, generous with information and advice to others, and ever interested in the practical as well as the academic application of the Law of Real Property, it is believed that he would have welcomed the publication of the type of information which is contemplated and that gladly he would have contributed to such an undertaking.

FREDERICK W. KURTH, *Secretary.*

NOTES BY R. D. SWAIM.

The Conveyancers' Edition of Crocker's Notes on Common Forms purported to cover the law up to Chapter 414 of the Acts of 1938 and the decisions through page 1155 of the Advance Sheets of 1938. This memorandum is intended to call the attention of conveyancers to additional matters through page 69 of the Advance Sheets of 1939, and also to add to Crocker's Notes certain other matters which may be helpful.

*Sale of Land Subject to Contingent Interest.*

A sale of land subject to a vested or contingent remainder, executory devise, conditional limitation, reversion or power of appointment, etc., may be authorized by the Probate Court under G. L. (Ter. Ed.) c. 183 ss. 49–52. For cases where this statute was applied, see *Spring* v. *Hollander*, 261 Mass. 373, 158 N. E. 791; *Whitcomb* v. *Taylor*, 122 Mass. 243; *Bamforth* v. *Bamforth*, 123 Mass. 280. Notation of this statute and the cases should be made at the end of Section 11.

*Parsonages.*

By c. 317 of the Acts of 1938, s. 5 of c. 59 of the General Laws was amended to exempt from taxation parsonages to an amount not exceeding $5000. for each parsonage. Note this at the end of Section 44.

*Grant by One Tenant in Common.*

The right of a tenant in common to avoid a deed by his cotenant of a part of, or of an easement in, the common land passes to his grantee. *Clapp* v. *Atwood*, 1938 Adv. Sh. 1203, 16 N. E. (2d) 67. Cite this to Section 49.

*Sewer Taking.*

In *Markiewicus* v. *Methuen*, 1938 Adv. Sh. 1239, 16 N. E. (2d) 32, the proceedings for taking a sewer easement in 1894 are outlined. The proceedings were bad but the owner at the time was estopped to object and a subsequent owner had no right to object or to claim damages even though he had no knowledge that the sewer was there. This might be cited to Section 165.

*Resulting Trust.*

In *Moat* v. *Moat*, 1938 Adv. Sh. 1809, 17 N. E. (2d) 710, the evidence was insufficient to establish a resulting trust of real estate for the husband in the wife. The case contains a statement of the law and what must be proved to establish such a trust. Note of this case should be made in Section 68. See also *Gerace* v. *Gerace*, 1938 Adv. Sh. 1267, 16 N. E. (2d) 6, where a trust was established.

*Dedication of Way.*

Reference to G. L. (Ter. Ed.) c. 84 ss. 23–25 should be made in Section 137 for procedure for a municipality to avoid liability where ways are opened for public use. Quaere whether this statute prevents dedication of a way without formal acceptance or the acceptance by failure to close or by making repairs. As to a public way by prescription, see *Wilbur* v. *Claflin*, Land Court 15863, No-

vember 21, 1938, citing *Bagley* v. *New York, N. H. & H. R. R.*, 165 Mass. 160, 42 N. E. 571, and *Odiorne* v. *Wade*, 22 Mass. 421, and the law that ancient fences or buildings fix the lines of ways where such are otherwise unknown, G. L. (Ter. Ed.) c. 86 s. 2; *Vye* v. *Medford*, 266 Mass. 208, 165 N. E. 34. This statute and the case may be added to Section 151.

*Right of Way Based on a Plan.*

In *Enterprise Realty Co.* v. *Kapples*, Land Court 16809, decided November 14, 1938, the Land Court gave effect to a plan showing a right of way. This case might be added to the last paragraph of Section 137.

*Rights to Use of Ways.*

The Opinion of the Justices, as to the use of parking meters, 1937 Adv. Sh. 615, 8 N. E. (2d) 179, contains a discussion of the rights of the public and of private land owners in ways and should be added to Section 152 and Section 707.

*Prescriptive Rights to Maintain Dam.*

Such rights including liability for flooding where the flooding was claimed but not found to be an act of God were discussed in *New England Mica Co.* v. *Waltham Factories, Inc.*, 1938 Adv. Sh. 1325, 16 N. E. (2d) 81. This might be added to Section 156. The case is also an authority on the implied promise by the grantee by acceptance of the deed to maintain the dam and should be noted in Section 171.

*Rights of Assignee of a Mortgage Which Is a Preference or a Fraudulent Transfer.*

See *In re French*, 32 Am. Bankruptcy Reports, 652, in which it is said that the assignee with notice of its fraudulent character would stand in no better position than the mortgagee. If the only infirmity was the fact that it was voidable as a preference it was said to be doubtful whether it would defeat the assignee's lien, at least to the extent of the credit given after the assignment. The assignee could not foresee that bankruptcy would intervene within four months, and, if otherwise valid, the mortgage was good until avoided as a preference. This case might be noted to Section 405.

*Assignment of Rent to Mortgagee.*

In *In re H. K. Porter Co.*, 24 Fed. Suppl. 766, an assignment of rents by a mortgagor to the mortgagee was held good in proceedings under 77B. This might be cited in the margin of Sec. 501 and of Sec. 521.

*Tort for Foreclosure in Bad Faith.*

In *Levin* v. *Reliance Corp.*, 1938 Adv. Sh. 1383, 16 N. E. (2d) 88, an attaching creditor of the mortgagor failed to show damage.

*Recording of Deeds.*

In *McCarthy* v. *Lane*, 1938 Adv. Sh. 1441, 16 N. E. (2d) 683, the rights of a grantee under a recorded deed without notice of a deed later recorded are once more affirmed and the general rule requiring removal of encroachments restated. This might be noted in connection with Section 635 and also perhaps Section 142.

*Insurance.*

For a case upholding oral coverage pending the issue of a policy, see *Shumway* v. *Home Fire and Marine Ins. Co.*, 1938 Adv. Sh. 1723, 17 N. E. (2d) 212. This might be added to Section 713.

*Permanent Improvements by Lessee.*

As to whether such are taxable income of the Lessor on termination of the lease, see *Dominick* v. *U. S.*, 24 Fed. Suppl. 829. Add at the end of Chap. XX.

*Lease.*

*Foley* v. *Gamester*, 271 Mass. 55, might be noted to Sections 732 and 744 as a case of lease which the lessor could terminate because being for as many years as the lessee should desire neither party was bound for a definite term.

*Taxes.*

The rate of interest on local taxes at 4% was fixed by Chap. 330 of 1938, amending G. L. (Ter. Ed.) c. 59 s. 57. Cite to Section 765.

*Sewer Assessment for Sewer Privately Laid but Later Taken Over by the Town.*

See *Slocum* v. *Brookline*, 163 Mass. 23, 39 N. E. 351. Cite to Section 766.

*Shutting Off Water for Unpaid Water Rates.*

In *Trimount Co-operative Bank* v. *Boston*, Suffolk Superior Court in 1932. Judge Collins allowed a mortgagee to recover back money it had paid on threat of turning off water for water rates incurred by a predecessor in title.

The present statute as to water liens is Ch. 415 of 1938.

Cite these to Section 767.

*Escrow.*

For a case sustaining delivery in escrow of a check and contract of sale, see *Exchange Realty Co.* v. *Bines*, 1939 Adv. Sh. 9. Cite this case to Section 627.

*Contract of Sale with Straw.*

Specific performance against the principal was denied in *Exchange Realty Co.* v. *Bines*, 1939 Adv. Sh. 9. This case illustrates the weakness of a contract with a straw. This should be cited to Sections 711 and 366.

*Lease.*

A seller's representation as to a lease not disclosing that there had been an oral concession not amounting to a modification was held not fraud so as to prevent specific performance in *Exchange Realty Co.* v. *Bines*, 1939 Adv. Sh. 9. This should be noted in Sections 731 and 711.

*Mortgage by Corporation.*

*Greene* v. *Reconstruction Finance Corporation*, 100 Fed. (2d) 34, holds that a trustee in bankruptcy cannot attack a mortgage on the ground that it was not authorized by the stockholders as well as the directors as required by Delaware law. This should be cited to Section 41.

*Mortgage of After Acquired Personal Property.*

Such requires the taking of possession by the mortgagee but if the chattels have been bought on conditional sale he acquires no greater rights than the mortgagor had. *Bancroft Steel Co.* v. *Kuniholm Manufacturing Co.*, 1938 Adv. Sh. 1361, 16 N. E. (2d) 78. This should be cited to Section 796.

*Widow of Non-Resident Intestate.*

*Hite* v. *Hite*, 1938 Adv. Sh. 1631, 17 N. E. (2d) 176, discusses the past and present law as to what a surviving spouse takes and in particular what the widow of a deceased non-resident intestate takes. Having taken personalty elsewhere she does not come under the $5000. statute but takes one-half the realty under G. L. (Ter. Ed.) c. 190 s. 1. Cite this to Section 810.

*Low Value Land-Tax Taking.*

The constitutionality of the statute was upheld in *Napier* v. *Springfield*, Land Court 3175 Misc. December 23, 1938. Cite this to Section 885.

*Deed of Tax Title Land.*

Sale and deed by City Treasurer was upheld in *Hia Pearl Corporation* v. *Anderson*, Land Court 16802 November 15, 1938. And see c. 358 of 1938 as to custodian of such. Cite to Section 886.

*Recovery Back of Amount Paid to Discharge an Alleged Mortgage Which in Fact He Had Not Given.*

Such cannot be recovered back. The plaintiff's remedy is in equity to restrain foreclosure. *Carey* v. *Fitzpatrick*, 1938 Adv. Sh. 1871, 17 N. E. (2d) 882. Cite this to Section 461.

*Adverse Possession.*

Acts constituting such as to acquire title are discussed in *La Chance* v. *Rubasche*, 1938 Adv. Sh. 1835, 17 N. E. (2d) 685. Note this to Section 142.

*Restrictions and Clean Hands.*

Marquees and supports violated restrictive setbacks on Huntington Avenue and the plaintiff's minor violations did not prevent enforcement. *Gilbert* v. *Repertory Inc.*, 1939 Adv. Sh. 21. Cite this to Section 174.

*Easement in Gross or License.*

An unsealed writing giving an advertising company the right to maintain a billboard gave an easement in gross and was specifically enforced in *Baseball Pub. Co.* v. *Burton*, 1938 Adv. Sh. 2057, 18 N. E. (2d) 362. Cite to Section 149.

ROGER D. SWAIM.

## NEWHALL'S "FUTURE INTERESTS AND RULE AGAINST PERPETUITIES IN MASSACHUSETTS."

Most of us knew, or were supposed to know and are still supposed to know, something about the subject of this little book. Any lawyer in general practice, even if he is not constantly dealing with titles or beneficial interests, is likely to be faced suddenly with the subject at any time and most of us know that we have forgotten much of whatever we may have known about the subject.

This small book of 126 pages, published by Eugene W. Hildreth and covering not only the subjects indicated in the title but also, "illegal conditions and restraints and spendthrift trusts", is written as a handy reference book for most of us, as well as for law students.

As the author states in his introduction, "Although there are several large books dealing extensively with the subject" he "feels that there is a distinct field for a small text-book of this sort" for ready reference as well as an introduction to the larger treatises. Newhall's well-known and much used book on, "Settlement of Estates," has been found sufficiently useful in practice so that the bar does not need to be convinced that anything he writes on any other subject is also likely to be useful in practice.

F. W. G.

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## MASSACHUSETTS BAR ASSOCIATION.

### NOTICE OF TWENTY-NINTH ANNUAL MEETING.

**The twenty-ninth annual meeting of the Massachusetts Bar Association for the election of officers, consideration of the reports of committees and such other business as may come before the meeting, will be held on Thursday, March 23rd, 1939, at 2.30 P. M., in the rooms of the Boston Bar Association in the Parker House, Boston. This date and hour were selected to give members an opportunity to attend the annual Bench and Bar dinner of the Boston Bar Association, which will be held that evening and at which Hon. Hatton W. Summers of Texas, Hon. Arthur W. Dolan and Hon. John P. Higgins are to speak.**

**The report of the Nominating Committee will be found on a following page.**

**After the regular business there will be opportunity for discussion of the 14th report of the Judicial Council. The fourteenth report will be found in the recent "Preliminary Supplement" of the QUARTERLY for January–March, 1939.**

**There will also be an opportunity for the discussion of the bill relative to rule-making in the courts, a copy of which is enclosed, see explanatory note below.**

**FRANK W. GRINNELL, *Secretary*,**
**60 State Street, Boston.**

## NOTE ON THE ENCLOSED BILL ABOUT RULE-MAKING.

The enclosed bill has been submitted to the Judiciary Committee as a substitute for Senate 225 and it has been approved, after independent consideration, by 17 out of the 25 members of the Executive Committee of the Massachusetts Bar Association and by the following committees of other associations: the Massachusetts Committee on Procedural Reform of the American Bar Association, the Executive Committee of the Law Society of Massachusetts, the Council of the Boston Bar Association and the Committee on Judicial Procedure (a business man's committee) of the Boston Chamber of Commerce. It would carry out the recommendation of Governor Saltonstall in his inaugural address which was printed in the *Preliminary Supplement* of the QUARTERLY for January–March, 1939 (page I). § 1 of the bill follows closely the act of Congress under which the new Federal rules were worked out with the assistance of the bar. The bill does not affect the present rule-making functions of the Superior Court or any court other than the Supreme Judicial Court. The provision that the rules of these other courts shall not conflict with rules made by the Supreme Judicial Court is taken from the last sentence of the present section 3 of Chapter 213 of the General Laws. § 3 of the bill is simply an adaptation of § 28 and § 28 A of G. L. Chap. 212, under which the annotated Superior Court rules are printed and distributed.

The whole subject was discussed in the recent *Preliminary Supplement* of the QUARTERLY (pp. II–III), and an account of the history and scope of rule-making in Massachusetts appears in the QUARTERLY for January–April, 1938 (pp. 9–15). The bill contemplates that rule-making in Massachusetts, as in the Federal Courts and in various other states, shall be the result of co-operation between representatives of the bar, the Judicial Council and the Court along the lines of the co-operation in the recent Federal rules, which have been frequently discussed in the QUARTERLY. It will simply be a revival of a normal ancient judicial function as part of the division of functions in the business of government and a function to be performed with the co-operation of the bar as a part of the judicial system.

In many years of observation, I have seldom noticed any subject on which there has been so much agreement among lawyers as has thus far appeared in support of the enclosed draft act.

Those members of the association who approve of the bill should communicate with their senator or representative in support of it, or write their views to the undersigned. There will be opportunity for further discussion of the matter at the annual meeting.

F. W. GRINNELL, *Secretary.*

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NOTE.

Since this notice went to press the secretary has been informed that the Norfolk County Bar Association after a report of a special committee has approved the bill. The Judicial Council has also approved the bill.

The bill enclosed with the notice will be found on the following page.

(The petitioner in connection with S.225, after consultation with several organizations of the bar, requests that the following bill be substituted.)

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## AN ACT RELATIVE TO RULE-MAKING IN THE COURTS.

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*Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:*

SECTION 1. In addition to the authority of the several courts to make rules, the Supreme Judicial Court may regulate by rule, pleading, practice and procedure in all the courts. Such rules shall not abridge, enlarge or modify the substantive rights of any litigant or affect the right of trial by jury under the constitution. Such rules shall become effective on such date, not less than thirty days, from the time of their promulgation by the court as the court may specify. Thereafter, all statutes in conflict therewith shall be of no further force or effect. The statutes or parts thereof thus superseded shall be specified in, or with, the rules thus promulgated.

The Supreme Judicial Court may appoint an advisory committee of the bar to assist the court in the preparation of such rules.

SECTION 2. This act shall not affect the authority of the several courts or classes of courts or the justices thereof to make rules, except that such rules shall not conflict with rules made by The Supreme Judicial Court and all such rules of other courts hereafter made shall be reported forthwith upon their adoption to the Chief Justice of The Supreme Judicial Court together with the date upon which such rules are to take effect.

All rules of all the courts in the Commonwealth shall be printed, annually or otherwise, in a single pamphlet or otherwise, by the Commonwealth in such form and in such manner as The Supreme Judicial Court deems in the public interest.

All rules in effect in any court shall be reported to the Chief Justice of The Supreme Judicial Court within thirty days after the effective date of this act.

SECTION 3. There may annually be expended out of the Treasury of the Commonwealth under the direction of the Chief Justice of The Supreme Judicial Court for publishing and distributing rules with such annotations as the court may direct such sums as may be appropriated for such purpose. All rules shall be distributed as said court may direct and copies of the rules not otherwise disposed of may be sold to the public at such price per copy as may be fixed by The Supreme Judicial Court, which price may be less than, but shall not exceed, the cost of printing, binding and paper. Copies intended for sale shall be transmitted under the direction of the Chief Justice to the several clerks of the court and shall be placed on sale by them at the price so fixed. Each such clerk shall, in January, April, July and October, in each year, pay into the State Treasury all sums received from the sale of such copies during the preceding quarter and shall report in writing to said Chief Justice the number sold during the preceding quarter and the number remaining on hand at the end thereof.

## REPORT OF NOMINATING COMMITTEE.

*To the Members of the Massachusetts Bar Association:*

Your committee submits the following nominations for the year 1939:

For *President:*
JOSEPH WIGGIN,
of Malden.

For *Vice-President:*
HON. ROBERT GRANT,
of Boston.

For *Treasurer:*
HORACE E. ALLEN,
of Springfield.

For *Secretary:*
FRANK W. GRINNELL,
of Boston.

For *Members At Large of the Executive Committee:*
MORRIS R. BROWNELL, of New Bedford,
JAMES N. CLARK, of Winchester,
W. ARTHUR GARRITY, of Worcester,
ROBERT E. GOODWIN, of Concord,
LISPENARD B. PHISTER, of Boston,
JAMES M. ROSENTHAL, of Pittsfield,
ROMNEY SPRING, of Boston.

Under the by-laws other nominations may be sent to the Secretary in writing before the meeting.

NATHAN P. AVERY, *Chairman.*

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*Note.*

The President, the last ex-President, the Treasurer and the Secretary are members of the Executive Committee *ex officio.*

Under the by-laws the presidents of the following fourteen *affiliated* associations, or a delegate of each of such associations designated by them, are members *ex officio* of the Executive Committee of the Massachusetts Bar Association:

Barnstable County Bar Association,
Berkshire County Bar Association,
Bar Association of the City of Boston,
Bristol County Bar Association,
Essex Bar Association,
Franklin County Bar Association,
Hampden County Bar Association,
Hampshire County Bar Association,
Law Society of Massachusetts,
Massachusetts Conveyancers' Association,
Bar Association of the County of Middlesex,
Norfolk County Bar Association,
Plymouth County Bar Association,
Worcester County Bar Association.

## TWENTY-NINTH ANNUAL MEETING OF THE MASSACHUSETTS BAR ASSOCIATION.

In accordance with the foregoing notice, the 29th annual meeting of the Massachusetts Bar Association was held in the rooms of the Boston Bar Association in the Parker House, Boston, on March 23rd, 1939, at 2:30 P. M. President Mayo presided.

The record of the 28th annual meeting was approved as printed in the MASSACHUSETTS LAW QUARTERLY for April–June, 1938 (pp. 38–43).

The following reports were presented:

### REPORT OF THE EXECUTIVE COMMITTEE.

*To the Members of the Massachusetts Bar Association:*

Following discussions by the committee of the related problems of finance and membership which have arisen during the depression, the situation was called to the attention of the association in the QUARTERLY for October–December, 1938 (pp. 1–2), as follows:

### PROBLEMS OF MEMBERSHIP AND FINANCE.

"Although there are apparently between 8,000 and 9,000 lawyers in Massachusetts, the membership of the association never rose above 1250, and since 1929 or thereabouts death and depression have reduced the number of paying members. The result is that while the possibilities of service to the bar increase, the interest of the bar in keeping itself informed about professional developments, which are constantly coming closer to the life and work of every lawyer, seems to decrease.

"The greater number of the members pay the $5.00 dues promptly ($2.00 for junior members of less than 3 years at the bar), but the paying membership which a few years before the depression had risen to 1250 has dropped to approximately 700. New members are, of course, needed. More than half the members of the Boston Bar Association have never joined the Massachusetts Bar Association and the same is true of the other county bar associations. The various bar associations, under the present voluntary system of organization, perform different functions, and it is right that they should, but, in order to perform these functions, some form of support is needed. The Massachusetts Bar Association has accomplished more for the bar than the bar realizes, simply by keeping about 1,000 lawyers and judges informed as to what has been going on in the profession and at the State House, but the bar generally has not contributed to its support by membership. No voluntary association ever has, and there is no reason to expect that any voluntary bar association ever will, secure more than a minority of the bar as members. But in these days of organization and the need of it, all the voluntary associations help and deserve support.

"There seem to be only two ways in which a bar association can raise funds with which to render service, one is by

the increase of membership *and every member of the association who can secure one or more new members can help in this way*,—the other is by some form of contribution for a specific purpose such as the publication of the QUARTERLY. In this way, not only the members, but the honorary members or other persons interested, if there are any, can help by becoming ' sustaining contributors '.

"The question is whether members or honorary members of the association, or others, consider the QUARTERLY of sufficient professional value to the community to lead them to become sustaining contributors to the Massachusetts Bar Association to a fund to be used *solely* for the preparation, publication and circulation of the QUARTERLY. Such annual or occasional contributions of any amounts would help in solving the problem which faces the association of curtailing the service rendered by the QUARTERLY, or curtailing other work of the association.

"The President, Secretary or Treasurer will be glad to hear from any one who is willing to contribute anything, large or small, to such a fund."

The responses to this suggestion from members of the association were limited to four or five. No honorary members (the judges of the Supreme Judicial, Superior, Land and Probate Courts) responded at all.

Under the circumstances, the association is faced with the need, suggested in the passage above quoted, of "curtailing" some of its services unless the membership can be increased.

The two activities of the association which involve the principal expense are the publication of the QUARTERLY, and the work of the Grievance Committee which costs about $1,000 annually for clerical service. This grievance work is primarily a problem of the local associations and the work of the association has always been to supplement and assist the local associations, which also have grievance committees.

As to the MASSACHUSETTS LAW QUARTERLY and the question of its continuance, it may be well to call the attention of the members, whose dues have supported it, to the following comment in a legal periodical of nationwide circulation. In the "*Journal of the American Judicature Society*" for February, 1939, (p. 229) appears the statement that,

> "The oldest bar association journal in the country, and in many respects the best through all its twenty-three years, is the MASSACHUSETTS LAW QUARTERLY."

This is a pleasantly flattering statement, possibly tinged somewhat with the gentle and friendly art of exaggeration, but it is true that the QUARTERLY is one of, if not, the oldest, state bar association journals which was founded as a result of a suggestion by Dean Wigmore in 1915. It has been, and still is, the only method by which the oldest statewide and rather loosely organized association in the Commonwealth, with limited funds, can be of continuous *direct* service to *all* its members.

For these reasons, and pending any movement for increasing the membership and, incidentally, the funds of the association, the Executive Committee recommends that the committee be authorized, if it is found necessary, to suspend the expense of the work of the Grievance Committee leaving such work to the local associations.

## BAR INTEGRATION.

The committee also continued its study of possible methods of organizing or "integrating" the bar, and, after a report by a special committee, considered in detail, and prepared, a tentative draft of a set of rules for the organization of the bar of the state to be submitted to the bar for discussion at such time as the discussion and interest in the subject reached a point at which it seemed worthwhile.

## RULE-MAKING BILL.

Meanwhile, the adoption of the amendment providing for biennial legislative sessions, the 14th Report of the Judicial Council (page 10) and the Governor's inaugural address focussed attention on the subject of reviving the rule-making functions of the courts. and, as explained in the notice of this annual meeting, a bill was prepared, a copy of which has been circulated to all the members of the association, and this bill was submitted by correspondence (as provided in the by-laws) to all the twenty-five members of the Executive Committee. Of the 18 members heard from, 17 expressed approval of the bill in substance accompanied in some cases with suggestions for slight changes in phraseology.

The bill is still pending before the legislature.

## MISCELLANEOUS.

The committee expressed the views of its members in opposition to a bill, Senate No. 223 of 1938, relative to trust and other companies authorized to act in fiduciary capacities which was referred to the committee for consideration at the last annual meeting.

HENRY R. MAYO, *President.*

After discussion of the problems of membership and finance,

*It was Voted* that the Executive Committee be requested to consider the problems with authority to take such steps as they deemed advisable for increasing the membership, and, if necessary, to suspend, or curtail, such work of the association as they deemed advisable.

The subject of the integrated bar, referred to in the report of the Executive Committee, was discussed and the members present voted to renew the expression of faith in the proposal recommended by the Judicial Council in its 13th Report (p. 39) for the organization of all the members of the bar of the Commonwealth by rule by the Supreme Judicial Court as a self-governing body subject to the constitutional authority of said court, and the Executive Committee was authorized to take such action as it deemed advisable to call the matter to the attention of the bar for further discussion in order that there might be a fuller understanding of the subject.

The general subject of rule-making, a proposed bill in regard to which had already been supported by the Executive Committee as stated in the report, was discussed at some length.

## TREASURER'S ACCOUNTING FOR THE YEAR 1938.

RECEIPTS

| 1938 | | | |
|---|---|---|---|
| Jan. 1 | Balance on hand, Third National Bank and Trust Company | | $32.42 |
| 1 | Balance on hand, Worcester Mechanics Savings Bank | | 1,463.32 |
| | George R. Nutter Trust Fund (Income only available) — (Bequest deposited in Springfield Institution for Savings) | | 1,500.00 |
| | Dues—1938—collected | | 3,744.00 |
| | Dues—1939—collected in advance | | 10.00 |
| | Dues—delinquent—collected | | 65.00 |
| | Interest—Worcester Mechanics Savings Bank | | 36.58 |
| | Interest—Springfield Institution for Savings | | 3.12 |
| | Miscellaneous receipts (back numbers of the QUARTERLY) | | 7.26 |
| | | | $6,861.70 |

DISBURSEMENTS

| | | |
|---|---|---|
| Treasurer's Expense | $117.89 | |
| Secretary's Expense | 509.50 | |
| Grievance Committee's Expense | 985.82 | |
| General Expense | 48.95 | |
| MASSACHUSETTS LAW QUARTERLY | 2,271.65 | |
| Dues paid twice refunded | 5.00 | |
| | | $3,938.81 |
| Balance in banks December 31, 1938 | | $2,922.89 |

BANK BALANCES

| 1938 | | |
|---|---|---|
| Dec. 31 | Third National Bank and Trust Company | $359.57 |
| 31 | Worcester Mechanics Savings Bank | 1,063.32 |
| 31 | Springfield Institution for Savings (George R. Nutter Trust Fund) | 1,500.00 |
| | Total | $2,922.89 |

I certify that the above account is a true statement of my receipts and disbursements for the Massachusetts Bar Association during the year 1938.

HORACE E. ALLEN, *Treasurer.*

The report was accepted with a vote of thanks for the services of the treasurer.

## REPORT OF THE GRIEVANCE COMMITTEE.

The Secretary of the Committee on Grievances presents the following report for the period commencing January 1, 1938 and ending December 31, 1938:

One hundred thirty-five formal complaints were disposed of during the year 1938, an increase of but three complaints over those received during 1937; eight complaints were pending at the beginning of the year, and seven were pending at the close of the year.

Owing to the time and expense involved in holding meetings of the Committee, the policy has been continued of handling many complaints by the Secretary and Chairman which might otherwise be subjected to delay awaiting an accumulation of sufficient cases to justify the calling of a meeting. As in the previous year, but one meeting of the Committee was held, and that was on October 21, 1938, at which meeting the Committee voted to dismiss three matters, and three matters were filed or continued pending disposition of civil claims. All serious complaints and those as to which the Secretary has had any doubt have been turned over to the Chairman, who has promptly and carefully gone through each folder. The Secretary has then handled each case in accordance with the written suggestions of the Chairman.

The policy of referring complaints to the Bar Association of the City of Boston whenever the attorney involved has offices in Suffolk County has been continued. So too has been continued the policy of referring complaints to other local bar associations whenever to do so seemed advisable.

The expenses of the Secretary of the Grievance Committee from January 1, 1938 to December 31, 1938 were as follows:

| | |
|---|---|
| Stenographic services | $936.00 |
| Disbursements | 24.22 |
| Martindale-Hubbell Law Directory | 25.60 |
| | $985.82 |

This represents a decrease of $22.99 from the year 1937.

A summary of all formal complaints which have been before the Secretary of the Grievance Committee are as follows:

| | Complaints | |
|---|---|---|
| Investigated and dismissed by Secretary | 5 | |
| Dismissed on Statement of complainant; no basis for complaint | 3 | |
| Abandoned by complainant (Want of prosecution by complainant) | 29 | |
| Adjusted to satisfaction of complainant (complaint withdrawn) | 3 | |
| Civil cases (complaint referred to attorneys) | 7 | |
| Filed by Committee | 3 | |
| Dismissed by Committee after hearing | 3 | |
| Miscellaneous | 19 | |
| Referred to Bar Association of the City of Boston | 41 | |
| Referred to other Bar Associations | 15 | |
| Total disposed of | | 128 |
| Pending January 1, 1938 | 8 | |
| Pending December 31, 1938 | | 7 |
| Total formal complaints | | 135 |

Members of the Massachusetts Bar will be interested to know that the National Conference of Bar Examiners through its Secretary, Will Shafroth, Esq., of 605 South State Street, Ann Arbor, Michigan, has become very active and effective during the year. A list of the representatives from each state has been furnished to your Secretary and the National Committee has become a clearing house of information as to attorneys seeking admission to the bar of other states. During the year your Secretary has furnished information to the National Committee on approximately twenty-five occasions. The result of such work will undoubtedly prevent a repetition of the experience of three or four years ago when a Massachusetts lawyer absconded with money which he held as a trustee in bankruptcy and thereafter obtained admission to the bar in the states of Texas and Washington under assumed names and forged credentials from the Clerk of the Supreme Judicial Court of Massachusetts.

Countless other inquiries by telephone and letter have been handled for other bar associations and individuals from not only Massachusetts, but all over the United States and even from foreign countries. No record of these inquiries is kept, as much of this work might properly be considered as the work of a separate committee on public relations.

The policy of handling all inquiries with patience and firmness has been continued and the effort has been made to send away all inquirers with the feeling that their matter has been handled promptly and carefully by the "Bar Association".

As in previous years, your Secretary closes his report with a reference to his viewing the functions of a Grievance Committee as a double-barreled responsibility; one duty is to investigate and press all proper complaints, and the second is to protect honest attorneys from improper attack. This policy has been continued, and letters received from the bar and the public are generally of an appreciative nature, although once in a while the routine of your Secretary is delightfully broken by a letter equally vigorous but scarcely as appreciative.

Respectfully submitted,

LISPENARD B. PHISTER,
*Secretary, Committee on Grievances.*

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The report was accepted with an expression of thanks.

The report of the Nominating Committee, printed in the notice

of the meeting, was presented, and, a ballot being taken, the following persons were duly elected for the year 1939:

*President,* Joseph Wiggin of Malden; *Vice-President,* Robert Grant of Boston; *Treasurer,* Horace E. Allen of Springfield; *Secretary,* Frank W. Grinnell of Boston; *Members at Large of the Executive Committee,* Morris R. Brownell of New Bedford; James N. Clark of Winchester; W. Arthur Garrity of Worcester; Robert E. Goodwin of Concord; Lispenard B. Phister of Boston; James M. Rosenthal of Pittsfield; and Romney Spring of Boston. As stated in the report of the Nominating Committee printed at the beginning of this record, the other members of the Executive Committee are the presidents, or other delegates, of fourteen affiliated associations.

The meeting adjourned at 5 P. M.

FRANK W. GRINNELL, *Secretary.*